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No. 99-1437 and No. 99-1438

In the Supreme Court of the United States

OCTOBER TERM, 1999

CUMBERLAND FARMS, INC., ET AL.,
Petitioners,

v.

NORTHEAST DAIRY COMPACT COMMISSION, ET AL.,
Respondents.

NEW YORK STATE DAIRY FOODS, INC., ET AL.,
Petitioners,

v.

NORTHEAST DAIRY COMPACT COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Petitioners have failed properly to apprise this Court of the parties to the proceeding. First, petitioners incorrectly name Daniel Smith as a respondent. As petitioners know, on May 27, 1998, the district court granted the Commission's unopposed motion pursuant to Fed. R. Civ. P. 25(d) to substitute Kenneth M. Becker for Daniel Smith as the proper party-defendant in this matter because Mr. Becker had succeeded Mr. Smith as the Commission's Executive Director. *See* Pet. No. 99-1437 at App. 3 (referring to Mr. Becker). Second, petitioners neglect to inform the Court that Farmland Dairies was also an appellant in the proceeding below, but opted not to seek certiorari review.

Petitioners' filings also violate Rule 12.4, which provides that parties "may petition separately for a writ of certiorari; *or* any two or more may join in a petition" (emphasis added). Petitioners New York State Dairy Foods, Inc. ("NYSDF") and Elmhurst Dairy ("Elmhurst") improperly opted to do both. They "join[ed]" the petition filed on behalf of NYSDF, Elmhurst, Cumberland Farms, Inc. ("Cumberland"), and Crowley Foods, Inc. ("Crowley"), *see* Pet. No. 99-1437 at ii, and also filed their own separate Pet. No. 99-1438. For the convenience of the Court, this Opposition responds to both the filing on behalf of all petitioners (Pet. No. 99-1437), and the unauthorized second petition of NYSDF and Elmhurst (Pet. No. 99-1438).[1]

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[1] Petitioners also appear to have violated this Court's rules regarding appearance of counsel. The counsel of record in No. 99-1437 apparently is counsel only for Petitioner Cumberland Farms. *See* Pet. 30 ("Attorneys for Petitioner"); Cumberland Farms' Waiver of Right to File a Response in No. 99-

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INTRODUCTION

Petitioners' efforts to invoke this Court's certiorari jurisdiction consist of a scattershot series of case-specific challenges to the application of settled rules of law, many of which were not properly raised and preserved in the course of the extensive administrative and judicial proceedings below. Indeed, petitioners appear to have abandoned the erroneous argument that they principally urged on administrative and district court review -- *i.e.*, that the Northeast Dairy Compact Commission lacks all authority to regulate milk that is distributed within the Compact region, but that originates outside that region. On appeal, petitioners appeared to focus on a fundamentally different challenge to the Compact -- its allegedly unlawful failure to mandate identical treatment for milk processors located inside and outside the Compact region -- notwithstanding that the district court had expressly found this claim to have been "inadequately briefed or explained." Appendix to Cumberland Petition ("Pet. App.") at 75, n.11. While this and other procedural defects provide a more than adequate basis for rejecting the present petitions, they are not the only such basis. Rather, as set forth below, petitioners simply fall far short of demonstrating that any of their "questions presented" comes close to satisfying this Court's standards for the exercise of its certiorari review.

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1438 (indicating that the counsel of record in No. 99-1437 represents only Cumberland). Thus, the other three "petitioners" have no counsel listed in No. 99-1437. Indeed, "Petitioner" Crowley has no counsel listed on *either* No. 99-1437 *or* No. 99-1438. *But see* S. Ct. Rule 34.1(g) ("Each document shall bear on its cover . . . the name of the attorney who is counsel of record for the party concerned . . . ").

STATEMENT OF THE CASE

The Northeast Interstate Dairy Compact ("Compact") is an interstate agreement among the states of Maine, Vermont, Connecticut, Massachusetts, New Hampshire, and Rhode Island. Pet. App. at 4. Overwhelmingly supported by these six diverse states and approved by Congress, *Id.* at 4, 10, the Compact addresses the New England dairy farming crisis -- a crisis that threatens not only the livelihoods of dairy farmers themselves, but also the Compact region's broader economy and environment. *Id.* at 154-55. The Northeast Dairy Compact Commission ("Commission") is the six-state governmental agency authorized to implement the Compact. *Id.* at 4.

1. ***The Compact*** -- Individual state efforts to respond to New England's severe dairy farming crisis have proved unworkable. Among other difficulties, in light of the pervasively interstate nature of dairy farming and distribution in the New England region, a number of such efforts were invalidated on Commerce Clause grounds. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). Under the Compact Clause (Art. I, §10, cl.3), however, states may enter into interstate agreements with the approval of Congress and regulate on an interstate basis; congressional approval of an interstate compact removes compact activities from dormant Commerce Clause challenge, and transforms the states' agreement into federal law. *See, e.g., Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985) ("Here the commerce power of Congress is not dormant, but has been exercised by that body . . . . When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.").

Between 1989 and 1993, the legislatures of the six Compact states overwhelmingly approved the Compact after an extensive democratic process. *Milk Industry Foundation v. Glickman*, 132 F.3d 1467, 1471 (D.C. Cir. 1998). In 1996, Congress explicitly "consent[ed]" to the Northeast Interstate Dairy Compact in Section 147 of the Farm Bill (7 U.S.C. § 7256 (1996)). As is common, Congress also adopted certain conditions in consenting to the Compact. 7 U.S.C. § 7256(1)-(7).[2]

The Compact authorizes the Commission to regulate milk distributed in the Compact region by adopting regulations establishing the minimum price that farmers shall receive from processors (or "handlers") for that milk. Compact §§ 4, 8-10. Handlers subject to regulation under the Compact include "pool plants" and "partially regulated plants." *Id.* §§ 9(d), 2(7). "Pool plants" are milk processing plants located in the region. *Id.* § 2(6). "Partially regulated plants" are plants located outside the region that *either* (1) distribute milk in the region, *or* (2) purchase milk from farmers in the region. *Id.* § 2(7).

Each Compact state has a single vote in the Commission's affairs. Compact § 4. No price regulation may be adopted without a two-thirds vote of all states; and no state is subject to a regulation it has not voted to adopt.

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[2] Petitioners inaccurately state that Senate Joint Resolution 28, 104th Cong. (1995), reproduced at Appendix E of the Cumberland Petition (Pet. App. 149-87), "set[s] forth the text of the Northeast Interstate Dairy Compact." Cumberland Pet. at 3. In fact, however, Congress consented only to "section 1(b) [of] Senate Joint Resolution 28." 7 U.S.C. 7256. Section 1(a), which is also included in petitioners' Appendix E (Pet. App. 151-54), was not approved by Congress and is not a part of the Compact. Congressional legislation has now extended the Compact through September 30, 2001. *See* 7 U.S.C. § 7256(3) (*as amended by* Pub. L. No. 106-113, § 4 (1999)).

Id. §§ 4, 5. Each state must appoint a carefully constituted delegation to the Commission, comprising three to five members and including at least one consumer representative and one dairy farmer. *Id.* § 4. The Compact also specifies an administrative procedure to address milk handler objections. *Id.* § 16(b). Patterned after a parallel federal provision, the Compact requires exhaustion of administrative remedies and provides for judicial review of the Commission's final administrative decision. *Id.* § 16(b)-(c); 7 U.S.C. § 608c(15).

2. ***The Commission's Regulation*** -- In May 1997, the Commission exercised its notice-and-comment rulemaking authority under the Compact to adopt a price regulation, effective July 1, 1997. 62 Fed. Reg. 29,626 (codified at 7 C.F.R. pt. 1300). This regulation supplements an extensive federal system for regulating milk prices established pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, under which the Secretary of Agriculture's "milk marketing orders" set the minimum price that farmers receive from processors. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 341-42 (1984). In this federal system, handlers make payments for milk they purchase from farmers into a "pool," and the pool administrator pays money from that "pool" back to the handlers for distribution to farmers.

The Commission's regulation, adopted by a 6-0 vote of the Compact states, supplements the federal system by establishing an "over-order" price that similarly requires processor payments into a "pool," from which payments are made back to processors for distribution to producers. Specifically, the regulation provides that the minimum price paid by handlers for "Class I" (fluid) milk will be $16.94 per hundredweight (*i.e.*, one hundred pounds of milk). 7 C.F.R.

§ 1305.1. Thus, if the federal price were $15.94 per hundredweight for a given month, the handler's "over-order" obligation to be paid into the Compact pool for that period would be $1.00 per hundredweight; if, however, the federal price were $16.94 per hundredweight or higher, there would be no over-order obligation for that month.

The Commission's price regulation provides for regulation of both pool plants and partially regulated plants. 7 C.F.R. § 1301.9(a)-(b). The regulation makes no distinctions based on the location of the farmer in terms of farmer benefits from the regulation. A farmer in New York (outside the region) that supplies a pool plant is treated exactly like a farmer in Vermont (in the region) supplying a pool plant. Similarly, a farmer in New York supplying a partially regulated plant is treated exactly like a farmer in Vermont supplying a partially regulated plant. *Id.* § 1307.4.

Pool plants and partially regulated plants are, however, treated somewhat differently -- based on differences in the two types of plants and their relationship to the region's milk supply -- in calculating disbursements from the pool. Disbursements to pool plants are based on the plants' total "producer milk," while disbursements to partially regulated plants are based on the plants' Class I milk distribution in the Compact region. *Id.* § 1307.2(b)(1). Thus, payments to processors located outside of the Compact region are based on their nexus to the region, *i.e.*, the milk they distribute in-region.[3]

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[3] Petitioners' claim that this differential treatment of pool and partially regulated plants is "discriminatory," *see, e.g.*, NYSDF Pet. at 8, and the hypothetical that petitioners presented to the district court, *see id.*, are both highly misleading. As the Commission explained in detail before the First Circuit, petitioners' hypothetical is entirely counter-factual, and the purportedly

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3. ***Petitioners' Challenge*** -- Petitioners Cumberland Farms, Crowley Foods, and Elmhurst Dairy are milk processors that operate plants in New York, and that purchase milk from farms located outside of the Compact region for distribution in-region. Petitioner New York State Dairy Foods, Inc., is a trade association representing New York handlers. The processor petitioners are thus "partially regulated" plants under the Commission's regulations.

(A) ***Request for Injunctive Relief*** -- In July 1997, petitioners and other co-plaintiffs sought emergency injunctive relief to block any Compact payments to New York farmers for milk distributed in the Compact region. The district court denied the injunction.

(B) ***Petitioners' Administrative Challenges*** -- At petitioners' request, the Commission agreed to afford expedited administrative review of their claims. Petitioners Crowley and Cumberland filed one consolidated administrative action; petitioner Elmhurst subsequently filed a second administrative action.

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"equal" treatment advocated by petitioners would lead to bizarre and perverse results. *See* Brief of Appellees Northeast Dairy Compact Commission and Kenneth M. Becker ("Commission's Brief on Appeal") at 50-54. The Commission's differential treatment of pool plants (which distribute over 90% of their milk in-region) and partially regulated plants (which distribute over 90% of their milk outside the Compact region, and which supply only about 2% of the region's milk) is sound and well-justified. *Id.* Contrary to petitioners' claims of "discrimination" against out-of-region interests, moreover, the Attorneys General of New York and New Jersey and the New York Farm Bureau -- an organization that protects the interests of New York farmers -- all participated as *amici* below defending the Commission's actions. Moreover, as the Court of Appeals emphasized, petitions failed properly to preserve an equal protection challenge to this purported "discrimination" in favor of pool plants. Pet. App. 24 n.9

Under Commission procedures, an administrative challenge has two steps: (1) consideration by a Hearing Panel of one-to-three individuals; and (2) consideration by the full Commission. 7 C.F.R. § 1381.4(a), (h). The Commission appointed Hearing Panels consisting of three Commissioners who were consumer representatives from the Commissioners' states. Pet. App. 35. The Panels included no dairy farmers or processors. *Id.* After considering petitioners' written submissions, providing petitioners the opportunity to request an oral hearing and present witnesses (which petitioners declined to do), and permitting petitioners to comment on their Proposed Decisions, the Hearing Panels ruled against petitioners in two "Final Proposed Decisions." *Id.* at 12-13.

The full Commission unanimously adopted the Hearing Panel's Final Proposed Decisions. *Crowley Foods, et al.*, HEP-97-001, 002, 004, 005 (Sept. 25, 1997) ("*Crowley*"), Pet. App. 82-145; *Elmhurst Dairy, et al.*, HEP-97-007, 008 (Dec. 3, 1997) ("*Elmhurst*").[4] Regarding the primary argument that petitioners pursued at that time -- that the Commission lacks all authority to regulate milk distributed in the Compact region that originates outside the region -- the Commission explained in detail that petitioners' claim to regulatory immunity would violate the language, structure and purpose of the Compact. Pet. App. 99-104. The Commission also rejected petitioners' claim that the congressional consent legislation mandated regulatory immunity for petitioners. The Commission wrote that, while

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[4] The *Elmhurst* Decision -- which petitioners failed to include in their petition -- concluded that the *Crowley* analysis "controls here, and is adopted and is incorporated by reference." *See Elmhurst* at 7. Accordingly, we refer to *Crowley*.

Congress's Condition Seven (7 U.S.C. § 7256(7)) denies the Commission authority to impose "compensatory payments" (in which payment obligations imposed on milk from outside the region are used solely to "compensate" in-region producers and are *not* shared with the out-of-region producers providing the milk), the congressional legislation and Compact explicitly retain the Commission's "pooling" authority (in which milk distributed in the region is pooled, with payments from the pool going to all producers who provided the milk, regardless of their location or the location of the handler). Pet. App. 111-17.

The Commission also rejected petitioners' Due Process challenge. The Commission found that including dairy farmers as part of an overall state delegation in the rulemaking process does not violate due process; rather, the general practice of including industry representatives on rulemaking bodies is well-settled and constitutional. Pet. App. 133-35. Similarly, the Commission concluded that the participation in the hearing process of Commission members who had participated in the rulemaking was not unconstitutional. *Id.* at 136-37.

(C) ***Judicial Review*** -- Petitioners sought review of the Commission's decision in district court. On November 2, 1998, the district court denied petitioners' summary judgment motion and granted the Commission's summary judgment motion. Pet. App. 38-81.

The court rejected petitioners' primary challenge that the Commission lacks all authority to regulate milk that is distributed in the Compact region, but that originates outside the region. Like the Commission, the court concluded that §§ 2(7), 9(d), and 10(7) of the Compact expressly authorize the Commission to adopt provisions "specially governing"

the "pricing and pooling" of milk handled by partially regulated plants -- plants which, by definition, are located outside the region but distribute fluid milk in-region (§ 2(7)). Pet. App. 68-69. The court also joined the Commission in rejecting petitioners' argument that, even if the Compact itself gives the Commission authority over in-region milk originating from outside the region, the congressional consent legislation invalidates that authority. *Id.* at 70-73. In response to petitioners' new contention that the Commission's regulations violated the Commerce Clause because they did not sufficiently *include* partially regulated plants -- that is, because the regulation does not provide for identical payments to pool plants and partially regulated plaints -- the court found that petitioners' claim had been "inadequately briefed or explained," and therefore had not been preserved. *Id.* at 74-75 n.11.[5]

Finally, regarding petitioners' Due Process challenges to the Commission's composition, the district court recognized that "[i]ndividuals from a particular industry typically serve on administrative bodies with regulatory authority over that industry." Pet. App. 77. The court noted that the Compact mandates the inclusion, within each state delegation, of at least one "consumer representative," *Id.* at 79, and held that the judgment of six sovereign states and Congress that "dairy farmer expertise" should be included "within each state delegation" was permissible, in light of the overall "constituency of the state delegations." *Id.* at 79-80.

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[5] At the summary judgment hearing, the district court repeatedly warned petitioners that their new claim of differential treatment had not been adequately raised. *See* Commission's Brief on Appeal at 47 & n.20. Although petitioners' motion was pending for seven months after the hearing, petitioners never submitted supplemental briefing, or any further explanation to address the district court's concerns. *Id.*

On appeal to the First Circuit, petitioners recast the essence of their challenge to the Compact. Petitioners emphasized the argument that the Commission's regulation purportedly violates the dormant Commerce Clause because it does not treat partially regulated plants exactly the same as pool plants -- the very claim that, as noted above, the district court had held to be "inadequately briefed or explained," and therefore not preserved. At the same time, petitioners continued to urge that the Commission lacks all authority to regulate handlers who distribute out-of-region milk within the Compact region, and also renewed their Due Process arguments.

In a careful and detailed decision, the First Circuit unanimously agreed with the lower court and the Commission that all of petitioners' arguments lacked merit. Pet. App. 1-37. The court found that the starting point for analyzing petitioners' Commerce Clause claims "is whether Congress consented to the actions of the Commission." Such consent, the court wrote, "must be either 'expressly stated,' [*Sporhase v. Nebreska ex rel. Douglas*, 458 U.S. 941, 960 (1982)], or "made unmistakably clear," [*South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984)]." Pet. App. 18-19.

The court first rejected petitioners' argument that "the Compact . . . allows the Commission to regulate only those handlers who receive milk produced within the Compact region." Pet. App. 20. The court found that, to the contrary, the Compact "specifically authorizes the Commission to regulate the 'pricing and pooling of milk handled by partially regulated plants.'" *Id.* (quoting Compact §§ 10(7), 2(7), 9(d)). The court also agreed with the district court that this plain language reflected the Compact's purpose; indeed, failing to authorize regulation of partially regulated plants

distributing milk from outside the Compact area in-region "would leave a gaping hole in the regulatory regime." Pet. App. 21.

The First Circuit also considered and rejected petitioners' claim that the Commission's regulations violate the congressional consent legislation. The court found that while the two kinds of plants "are not treated with absolute similitude," Congress's authorization of differential treatment (via the pooling mechanism) was clear: "Congress distinguished between compensatory payments under § 10(6), which Congress barred, and 'pricing and pooling of milk' under § 10(7), which Congress allowed." Pet. App. 23-25. Congress's consent to the Commission's regulation was thus "made unmistakably clear." *Id.* at 26-27.

Finally, the First Circuit also joined the Commission and the district court in rejecting petitioners' due process challenges. As to the Commission's rulemaking process, the Court found that petitioners' claim lacked merit regardless of the level of due process scrutiny afforded. Pet. App. 30-33. Regarding the Commission's hearing process, the court found that petitioners had not properly preserved their claim because they had failed to "mov[e] to disqualify all handlers and farmers from the Commission decision on their petitions." *Id.* at 36-37. Moreover, the court held, petitioners' challenge to the administrative hearing process also failed on the merits. *Id.* at 33-37.

REASONS FOR DENYING THE WRIT

I. The Standard For Determining Whether Congress Has Given Consent Under The Commerce Clause Is Well-Established And Was Properly Applied By The First Circuit.

Petitioners' primary argument in favor of certiorari review is that the Court of Appeals' decision raises an "important question of federal law" relating to the requirements for effective congressional consent in the Compact Clause and Commerce Clause contexts. *See* Cumberland Pet. at 13-20; NYSDF Pet. at 10-13. Specifically, petitioners suggest that the lower court was confused about these requirements, and erroneously substituted the lenient standard for congressional consent under the Compact Clause for the more demanding standard applicable to determining whether Congress consented to what might otherwise be a Commerce Clause violation. *See* Cumberland Pet. at 13 (asserting that the "decision of the Court of Appeals rests on the premise that conditional congressional consent (under the Compact Clause) . . . is adequate consent (under the Commerce Clause) . . . ."); NYSDF Pet. at 10 (characterizing the Court of Appeals' decision as "uphold[ing] trade barriers between Compact states and non-participating states, without finding unambiguous clarity in congressional consent as required for Commerce Clause purposes"). This argument, however, is both misleading and wrong.

Most importantly, petitioners' claim relies on a fundamental mischaracterization of the lower court opinion. Far from applying a lenient standard to the question "whether Congress consented to the actions of the

Commission," the lower court actually explained in detail that the "standard for finding congressional consent [in the Commerce Clause context] is high." Pet. App. 18-19. The court wrote:

> Such consent must be either "expressly stated," [*Sporhase*, 458 U.S. at 960], or "made unmistakably clear," [*South-Central*, 467 U.S. at 91]. . . . The statute or legislative history relied on as consent must "evince[] a congressional intent to alter the limits of state power otherwise imposed by the Commerce Clause." [*New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982)]. The burden of showing consent lies with the Commission. *See* [*Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992)].

Pet. App. 18-19. Indeed, not only did the lower court properly set forth the well-established standard for finding congressional consent in the Commerce Clause context, but it did so by citing *exactly the same decisions of this Court* upon which petitioners rely in arguing that the lower court applied an improper standard. *See, e.g.*, Cumberland Pet. at 21-22 ("Congress's consent [in the Commerce Clause context] must be expressly stated or unmistakably clear and unambiguous . . . .") (citing *Sporhase*, *South-Central*, *Wyoming*, and *New England Power*); NYSDF Pet. at 11 ("Congress's consent must be expressly stated or unmistakably clear and unambiguous . . . [under the] Commerce Clause.") (citing *Sporhase*, *South-Central*, and *Wyoming*). Accordingly, the confusion alleged by petitioners concerning the standard applicable to weighing

congressional consent in Commerce Clause context simply does not exist, and cannot justify the exercise of this Court's certiorari review.

Perhaps cognizant of the weakness of their contrived "important question of federal law," petitioners also argue that the First Circuit's decision "conflicts with relevant decisions of this Court." Cumberland Pet. at 20. The only "conflict" alleged, however, is that the court of appeals found consent where it purportedly does not exist "[u]nder the relevant decisions of this Court." *Id.* at 29. This portion of petitioners' argument is thus merely a case-specific challenge to the application of the settled standard for consent -- set forth in detail by the Court of Appeals -- to the particular circumstances of this case. Such a challenge does not warrant the exercise of this Court's review.

That is particularly true here because, contrary to petitioners' arguments, the lower court's application of the well-settled standard for consent was entirely correct. As the Commission, the district court, and the First Circuit have now unanimously found, "[t]here can be no dispute in this case that Congress expressly consented to the Compact," Pet. App. 18, and "the Compact specifically authorizes the Commission to regulate the 'pricing and pooling of milk handled by partially regulated plants.'" *Id.* at 20 (quoting Compact § 10(7)). "The Compact further provides that '[t]he Commission is hereby empowered to establish the minimum price for milk to be paid by pool plants, partially regulated plants and all other handlers receiving milk from producers located in a regulated area." Pet. App. 20 (quoting Compact § 9(d)). Thus, on its face, the Compact expressly and unambiguously authorizes the pricing and pooling of milk brought into the region by partially regulated plants.

Petitioners contended below that this express consent was somehow undercut by Congress's admonition that "[t]he Compact Commission shall not use compensatory payments . . . as a barrier to the entry of milk into the Compact region or for any other purpose." 7 U.S.C. § 7256(7) (1996). As the Commission, the district court, and the unanimous Court of Appeals all agreed, however, there is a simple, yet critical, difference between a "compensatory payment" and the pooling method at issue in this case. "[U]nder a compensatory payment system, the partially regulated plants would receive no disbursements whatsoever from the pool," thus "forc[ing] handlers outside the pool to pay what amounts to a tariff upon entry into the regulated area." Pet. App. 22-23. In contrast, the "pool payment mechanism," "by allowing for payments back to the out-of-compact producers . . . could be said to encourage the entry of [out-of-region] milk." *Id.* at 23. Thus, petitioners' contention that Congress's express consent to the Commission's regulations should be discounted on the basis of the ban on "compensatory payments" was properly rejected by the Commission and the lower courts.[6]

In sum, petitioners' argument that the opinion below requires review by this Court due to an alleged confusion surrounding the standards for congressional consent in the Commerce Clause context is based on a misrepresentation of the lower court's opinion. In fact, the Court of Appeals set forth precisely the standard that petitioners urge, and found it

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[6] For this reason, petitioners' reliance on Congress's condition that the "Commission shall not prohibit or in any way limit the marketing in the compact region of any milk . . . produced in any other production area" is also misplaced. *See, e.g.*, Cumberland Pet. at 24. Again, as the First Circuit found, by providing for pool payments to out-of-region processors, the Compact actually encourages the in-region marketing of out-of-region milk. Pet. App. 23.

to be satisfied. Petitioners' case-specific challenge to that finding cannot justify certiorari review, particularly given that the challenged holding was clearly correct.

II. The Circuit Court Conflict Alleged By Petitioners Does Not Exist.

In addition to the argument discussed above, Petitioners NYSDF and Elmhurst urge -- through the unauthorized filing of their *second* Petition for Certiorari in connection with the First Circuit's decision, *see* NYSDF Pet. at 13-16 -- that this Court should grant certiorari review because there is purportedly a "conflict between the circuits" arising from the decision below and the Third Circuit's opinion in *Sani-Dairy v. Espy*, 939 F. Supp. 410 (W.D. Pa. 1993), *aff'd Sani-Dairy v. Yeutter*, 91 F.3d 15 (3rd Cir. 1996). The "conflict" alleged by petitioners simply does not exist.

First, the Court of Appeals' decision in this case did not disagree with *Sani-Dairy* as a legal matter, but rather found the circumstances presented by that case distinguishable. Specifically, the lower court explained that the critical factual difference between this case and the "compensatory payment" cases cited by petitioner is that "under a compensatory payment system, the partially regulated plants would receive no disbursements whatsoever from the pool," Pet. App. 22, while the Commission's pool mechanism "allow[s] for payments back to the out-of-compact producers" and thereby "encourage[s] the entry of [out-of-region] milk." *Id.* at 23. Because this "crucial factor," *id.* at 22, distinguishes *Sani-Dairy* from the present case, the cases cannot constitute a "split" worthy of this Court's review.[7]

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[7] *See also* Pet. App. 72 n.10 (district court's explanation that compensatory (Continued...)

Moreover, the legal question decided by the district court (and affirmed by the Third Circuit in a one-page *per curiam* opinion) in *Sani-Dairy* had nothing to do with the issues presented by this case. The district court's opinion in *Sani-Dairy* expressly stated that "the issue in this case is whether the [Secretary of Agriculture's] Order 2 regulatory scheme act[ed] to 'prohibit' or 'limit' the marketing of nonpool milk in the Order 2 marketing area [New York/New Jersey] in violation of 7 U.S.C. § 608c(5)(G)." 939 F. Supp. at 413. Following this Court's decision in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U.S. 76 (1962), the district court observed that the statutory term "prohibit" should be interpreted to include economic trade barriers as well as physical restrictions. *Sani-Dairy*, 939 F. Supp. at 413. The Court then found that the "effect of the Secretary's regulations is not distinguishable from those struck down in *Lehigh Valley*," 939 F. Supp. at 415, and ruled in favor of plaintiffs. The Third Circuit adopted the district court's reasoning. *Sani-Dairy v. Yeutter*, 91 F.3d 15 (1996).

Clearly, however, the fact that the Third Circuit has held that a particular federal regulatory scheme establishes an economic trade barrier inconsistent with 7 U.S.C. § 608c(5)(G) does not raise a "conflict" with the First Circuit's holding in this case that the pool payments imposed by the Commission's regulations under the Compact are not "compensatory payments" within the meaning of Condition 7 of the congressional consent to the Compact. The cases

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payment cases cited by petitioners are distinguishable). Petitioners simply ignore this distinction, which has been noted by the First Circuit, the district court, and the Commission, and which petitioners have not refuted.

simply do not address the same issue. For this reason as well, the "split" alleged by petitioners does not exist, and thus cannot justify the exercise of this Court's certiorari review.[8]

III. The Standards For Determining Whether Agency Action Violates Due Process Are Well-Established, And The Decades-Old State Cases Cited By Petitioners Do Not Require This Court's Review Of That Issue.

Although the precise contours of their claim are not clear from their petition, New York State Dairy Foods and Elmhurst Dairy also apparently challenge, on due process grounds, the composition of the Commission both during its rulemaking process and during the administrative proceedings in this case. NYSDF Pet. at 16-19. Petitioners argue that this Court should grant certiorari review to provide "guidance" on the due process standards applicable to this claim. *Id.* at 19. In fact, however, neither aspect of this challenge merits review by this Court. The challenge to the administrative proceeding, moreover, clearly is procedurally defaulted.

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[8] The legislation approving the Northeast Interstate Dairy Compact is, of course, the only congressional legislation authorizing an interstate dairy compact; no decisions have been issued by any court -- and certainly none by a Court of Appeals -- disagreeing with the First Circuit's decision in this case.

A. Petitioners' challenge to the rulemaking process

Petitioners suggest that the Commission's rulemaking process should be evaluated under the due process standard applicable to adjudications, rather than the standard applicable to rulemaking, because a special principle purportedly applies to "ratemaking." *See* NYSDF Pet. at 16-17, 19 (citing *Railroad Comm'n v. Pacific Gas & Elec. Co.*, 302 U.S. 388, 393-94 (1938)). Petitioners also maintain that the "high courts of several states are in conflict" as to the applicable standard. *Id.* at 16-18. Contrary to petitioners' arguments, however, the standards for determining whether industry representation on a regulatory board violates due process are well-established, and were properly articulated by the Court of Appeals.[9]

The standard for the administrative exercise of adjudicative functions -- as correctly set forth by the lower court -- is whether "an adjudicator has a direct, personal, and substantial pecuniary interest in the outcome of the case." Pet. App. 30 (citing *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)). "Participation of adjudicators who 'might conceivably have had a slight pecuniary interest,' however, does not offend due process." Pet. App. 30-31. (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986)). As to legislative functions, "[t]he Due Process Clause sets a significantly lower bar. . . ." Pet. App. 31, because "the determination of legislative facts does not . . . implicate the same considerations as does the determination of adjudicative facts." *Id.* (quoting *Concerned Citizens of*

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[9] During the rulemaking itself, petitioners never requested recusal by any Commission member. *See* Commission's Brief on Appeal at 58 n.31.

Southern Ohio, Inc. v. Pine Creek Conservancy Dist., 429 U.S. 651, 657 (1977) (Rehnquist, J., dissenting)); *see also Friedman v. Rogers*, 440 U.S. 1, 17-19 (1979) (emphasizing difference in standard applicable to rulemaking functions and adjudicative functions).

Having thus set forth the two well-settled, potentially applicable standards, the First Circuit proceeded to find that the Commission's composition was constitutional *regardless* of which standard applies. First, treating the Commission's promulgation of regulations as an essentially legislative function, the court found that "[i]ndustry representation on regulatory boards [exercising such functions] is a common and accepted practice," fully consistent with this Court's leading case of *Friedman v. Rogers*, *supra*. Pet. App. 31-32. In addition, however, the court found that "we are not convinced that, given the significant attenuation of the commissioners' potential financial gain, their interest [even] rises to the level of substantiality required by the [adjudicative standard of] *Tumey* and its progeny." *Id.* at 32-33. Thus, not only are the due process standards for both legislative and adjudicative administrative actions well-established, but the First Circuit expressly found that -- on the specific facts of this case -- petitioners' constitutional rights were not violated even under the more stringent "adjudicative" standard that they urged the court to apply.[10]

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[10] Of course, as the Commission argued below, there can be no question that its regulation should be evaluated under the standard applicable to legislative functions. Indeed, because the challenged regulation involves broad policy issues and applies across-the-board to the regulated community on a prospective, going-forward basis, it is a quintessential example of agency exercise of legislative functions. *See, e.g., New Orleans Public Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 371 (1989) ("[R]atemaking is an essentially legislative act."); *Minnesota Rate Cases*, 230 U.S. 352, 433 (1913) ("The rate-making

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Moreover, petitioners' suggestion that a number of decades-old state court cases constitute a split on this issue meriting this Court's review is simply incorrect. In fact, those cases are reconcilable both with each other, and with the decision below. *New Hampshire Milk Dealers' Ass'n v. New Hampshire Milk Control Board*, 222 A.2d 194, 197 (N.H. 1966) -- which petitioners suggest is inconsistent with the decision below -- actually *rejected* the claim that the participation of a Board member who had allegedly "prejudged the issue for which he called a public hearing . . . and failed to disqualify himself from participation in the hearing" violated due process. Similarly, *Chrysler Motors Corp. v. Lee Janssen Motor Co.*, 534 N.W.2d 309, 335 (Neb. 1995), *rejected* Chrysler's challenge to the participation of car dealer-franchisees on the Nebraska Motor Vehicle Industry Licensing Board, while *Board of Supervisors v. State Milk Commission*, 60 S.E.2d 35, 38 (Va. 1950), expressly declined to "apply the same qualifications to members of an administrative agency created by the legislature as is required of judges in trying cases." *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 254 P.2d 29 (Cal. 1953), for its part, was not primarily a due process case at all. Rather, it relied on the non-delegation doctrine in striking down a statutory provision authorizing the Board to establish minimum prices for dry-cleaning; the fact that the statute "assume[d] to confer legislative authority

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power is a legislative power and necessarily implies a range of legislative discretion.") The present circumstances are thus thoroughly distinguishable from *Railroad Commission v. Pacific Gas & Electric Co.*, 302 U.S. 388 (1938), cited by petitioners, which involved a hearing on the narrow question whether the particular rates charged by the respondent were "just and reasonable." *Id.* at 391-92.

upon those who are directly interested in the operation of the regulatory rule and its penal provisions" only exacerbated the non-delegation problem. *Id.* at 448.

The only other case cited by petitioners is the Michigan Supreme Court's sixty-year-old decision in *Johnson v. Michigan Milk Marketing Board*, 295 N.W. 346 (Mich. 1940). That case involved a provision of the Michigan Milk Marketing Act creating a Milk Marketing Board to establish minimum prices to be paid producers by distributors. According to the majority, although this function was "legislative in nature," the act violated due process by "requir[ing] the appointment of a board, a majority of whose members have a direct pecuniary interest in the matters submitted to them." *Id.* at 351. Notably, however, the regulatory scheme addressed in *Johnson* entirely lacked the distinctive structural safeguards built into the Compact, including the delegation-based voting that the First Circuit held renders the ability of particular interest groups within the Commission to "influence their peers significantly more remote tha[n] it would be in a scheme in which each commissioner voted individually." Pet. App. 36. Accordingly, *Johnson* is critically different from the present case on its facts.

In sum, with regard to the Commission's rulemaking process, the confusion regarding applicable standards that petitioners allege simply does not exist. Those standards were properly set forth and applied by the Court of Appeals.

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B. Petitioners' challenge to the hearing process

Before the Court of Appeals, petitioners also argued that the participation of dairy farmers at the second stage of administrative review (*i.e.*, review by the full Commission) in this case violated due process. The First Circuit found, however, that petitioners had failed to preserve this claim because they "could have moved to disqualify all handlers and farmers from the Commission decision on their petitions," but "[t]hey did not do so." Pet. App. 36-37. To the extent that petitioners continue to pursue this argument before this Court, it is clearly procedurally defaulted and should not be considered.

In addition, the Court of Appeals correctly rejected this claim on the merits. Pet. App. 33-36. The court gave three reasons for its conclusion. First, "any potential financial interest on the part of individual [hearing] panel members is highly attenuated," and "too remote to have a constitutionally deficient effect." *Id.* at 33-34. Second, "the Commission's own regulations provide a due process safeguard" by requiring hearing panel members who "have no pecuniary interest in the outcome, and who are otherwise fair and impartial." *Id.* at 34-35. Third, on review by the full Commission, "the Commission members vote as state delegations, not individual members," which renders the possibility of improper influence by individual members "significantly more remote than it would be in a scheme in which each commissioner voted individually." *Id.* at 35-36. Thus, as the Court of Appeals found, petitioners' challenge to the hearing process would fail even were it not procedurally barred.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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